

2010 WL 10011346 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

In the Matter of the Conservatorship and Guardianship of Ruth C. SCUPHOLM, Respondent.
Kathleen M. S. Mikatich, aka Kathleen Scupholm Mikatich, Interested Party/Appellant.

No. 30201.
April 8, 2010.

CG No. 07-1-0012

Appeal from the Stipulated Order Granting Petition for Approval of Final Account, Termination of
Conservator and Discharge of Conservator, Filed February 6, 2009, filed herein on October 29, 2009
First Circuit Court
Honorable Colleen K. Hirai Honorable Bert I. Ayabe Judges

Opening Brief and Certificate of Service

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***1** COMES NOW KATHLEEN M. S. MIKATICH, aka KATHLEEN SCUPHOLM MIKATICH (hereinafter “APPELLANT KITTY”) by and through her attorneys, the Law Offices of Gary Y. Shigemura, and pursuant to [Rule 28 of the Hawaii Rules of Appellate Procedure](#) (hereinafter “HRAP”), files her opening brief.

I. CONCISE STATEMENT OF THE CASE

APPELLANT KITTY and her sister Dianne S. Frazier (hereinafter “sister”) filed to intervene in a lawsuit¹ distributing their father’s, Chester V. Scupholm (hereinafter “Chester”), assets in order that they may participate in a settlement agreement determining who would ***2** receive over \$1.2 million worth of assets belonging to Chester and/or his widow, Ruth Scupholm (hereinafter “Ruth”). Record on Appeal, Vol. 1, at pg. 49-64; Vol. 2, p. 146-60 (hereinafter “RA, V, p”). At a court hearing on March 14, 2008 in the Meredith Lawsuit, APPELLANT KITTY and her sister were orally denied the right to intervene in this lawsuit² as necessary interested parties. They timely appealed this decision and it is currently pending.³

In this separate civil lawsuit, at the hearing of March 14, 2008, it was announced that Chester's widow, Ruth, a protected person, had died that morning after a lengthy battle with advanced [Alzheimer's Disease](#). The CONSERVATOR participated in this hearing.

While waiting for the lower court to act on their petitions to be the Co-Personal representatives in their father's estate, APPELLANT KITTY and her sister turned to Ruth’s ***3** Conservatorship to try to prevent further loss of Chester's assets.⁴ *In the Matter of the Conservatorship of Protected Person, Ruth Scupholm* (hereinafter “Conservatorship”), CG No. 07-1-0012.

On November 23, 2007, Suzanne Terada, Esq. (hereinafter “CONSERVATOR”) was officially appointed by the court to be the conservator of Chester's widow, Ruth. RA, V.2, p. 174-78. Initially the CONSERVATOR was given control of some, but not all, bank accounts formerly controlled by Chester and/or Ruth as is made evident by her initial filing of inventory. RA, V.4, p. 296-301. Correspondence and/or telephone communications with the CONSERVATOR revealed that she did not have Chester and/or Ruth's bank records or discovery of their assets located at her office in order that she could itemize Ruth's Schedule of Property or Final Accounting. The CONSERVATOR relied on the files and discovery⁵ at Meredith and Moreira's legal counsel's Lyle T. Hosoda offices. At this time, neither Chester nor Ruth's estate were opened in the lower court and no Order allowing the distributions were issued by the Probate Court (hereinafter “lower court”).

APPELLANT KITTY and her sister accidentally discovered that fourteen (14) days after Ruth's death, the CONSERVATOR had filed three (3) petitions in the conservatorship, i.e., “*Petition for Authority to Compromise Claim With Kahala Garden Apartment Inc.*”; “*Petition for Authority to Compromise Claim*”; “*Petition for Authority to Compromise Claim re: Lau, et al.*”. RA, V.2, p. 228-42; RA, V.2, p. 245-65; RA, V.2, p. 268-71. One of the CONSERVATOR's petitions asked the court for authority to approve, compromise and distribute claims valued at \$1.2 million dollars in the conservatorship without an estate being opened for the protected person, Ruth, who had already died. RA, V.2, p. 246, 254-265.

APPELLANT KITTY and her sister did not receive notice of the CONSERVATOR's *4 petitions.⁶ The CONSERVATOR concealed the intent of the petition in the body of the pleadings themselves as one of her Petitions failed to mention on its caption page or in the body of the text that Ruth had died and that the CONSERVATOR was asking the court to approve a compromise and Settlement Agreement claim which would distribute over \$1.2 million dollars without a probate of Chester or Ruth. *Id.* The attached exhibit was the only indication that the claim the CONSERVATOR was asking the court to compromise was to review the heavily litigated Settlement Agreement. *Id.* The exhibits had to be reviewed at the court file room.⁷ The exhibit could not be viewed through the judiciary's online service as the name of the caption obscured the intent of the pleading. Chester's daughters accidentally found the pleading when they reviewed the related proceedings file at the circuit court file room. RA, V. 3, p. 25-32.

The reasons the CONSERVATOR set forth for not providing notice to APPELLANT KITTY and her sister, Chester's only children, of the claims she sought to have compromised is she argued that there were no assets belonging to Chester in Ruth's conservatorship. The CONSERVATOR argued that Barbara did not use undue influence to gain title to Chester and Ruth's assets, nor was Chester mentally incompetent at the time he transferred all assets to Barbara. Therefore his new will was valid and the Settlement Agreement in which Barbara returned title to Ruth and her heirs controlled. Further, the CONSERVATOR argued that all *5 assets held by Chester and Ruth in Joint Tenancies With the Right to Survivorship or held by Chester and Barbara in Joint Tenancies With the Right to Survivorship at the time of his death, could be redistributed pursuant to the terms of the Settlement Agreement.⁸

APPELLANT KITTY and her sister objected to the CONSERVATOR's petitions stating it was procedurally incorrect to file such claims after the protected person had died. “*Respondent's Objections to Conservator's Petition for Authority to Compromise Claim filed March 28, 2008 (Mediated Settlement in Meredith, et al v. Rapisora et al, Civil No. 07-1-1018-06)* filed April 24, 2008. RA, V.3, p. 16-46. APPELLANT KITTY and her sister consistently objected in their pleadings that a simple procedure was outlined by Hawaii statutes to follow once the protected person had died, i.e. within sixty (60) days of the death of the protected person the CONSERVATOR had to file a final accounting and ask for discharge and terminate the power of the CONSERVATOR. RA, V.3, p. 24, 31; V.3, p. 255-256; V.5, p.2. The CONSERVATOR did not follow these statutory mandates. However, in response to the aforesaid objections, on May 9, 2008, the CONSERVATOR filed a “*Schedule of Property*”, and a “*Memorandum Re: Schedule of Property*” for Ruth's Conservatorship and on May 15, 2008, she filed a

"Petition for Approval of Final Account Termination of Conservatorship and Discharge of Conservator". RA, V.3, p. 187-191; p. 195-210; p. 219-220.

Having been denied intervention and appealing in the aforementioned lawsuit, APPELLANT KITTY and her sister continued to object to the CONSERVATOR'S inventory as it incorrectly stated that Chester's assets belonged in Ruth's conservatorship. APPELLANT KITTY believed that Chester died intestate⁹ due to the undue influence of a third party causing *6 him to write a new will when he was mentally incompetent, and filed their, *"Memorandum in Opposition to Conservator's Memorandum re: Schedule of Property, filed May 5, 2008"*. RA, V.3, p. 16-43. APPELLANT KITTY and her sister continued to file objections, stating that the lower court was required to terminate Ruth's conservatorship and allow all assets from the conservatorship to flow into a formal and/or supervised probate for Ruth and Chester's separate estates,¹⁰ each being represented by a Personal Representative with fiduciary duties requiring allowing each Personal Representative to pursue all estate claims.

APPELLANT KITTY and her sister continued to attempt to open an estate for Chester to litigate who had the right to Chester and/or Ruth's asset. Simultaneously, however, the lower court ruled in Ruth's conservatorship that if "supplementary documents" were filed by Lyle T. Hosoda ("Hosoda") and Ronald P. Tongg's ("Tongg") concurring with four (4) statements laid out by the lower court, then the court would grant the petition to compromise the claims of the *7 Settlement Agreement. RA, V.5, p. 11-19. APPELLANT KITTY and her sister objected to the court's ruling on several grounds. RA, V.5, p. 123-156; p. 243-253. APPELLANT KITTY and her sister also objected to the CONSERVATOR's request to distribute all remaining funds in the conservatorship to Ruth's estate as the estate was being administered as an informal estate, without court supervision, by Karen L. Meredith as the named Personal Representative, whom had a known animus against Chester, APPELLANT KITTY and her sister. RA, V.6, p. 191, 196-198.

APPELLANT KITTY and her sister objected to all supplementary documents filed by Hosoda and Tongg as being improper evidentiary authority to approve the compromised claim in Ruth's Conservatorship. RA, V. 5, p. 243-253. APPELLANT KITTY objected to the CONSERVATOR's affidavit and schedules of property on October 22, 2009. RA, V. 6, p. 107-250; p. 251-346.

The lower court continued to hold hearings in the CONSERVATORSHIP during the fall of 2008 and after continuing the hearing twice, RA, V. 7, p. 69-70, 97-99. The lower court filed a *"Stipulated Order Granting Petition for Approval of Final Account, Termination of Conservatorship and Discharge of Conservator"* filed October 29, 2009.¹¹

II. STATEMENT OF POINTS OF ERROR ON APPEAL

A. The lower court erred in failing to find that the CONSERVATOR had a conflict of interest in multiple proceedings pursuant to [Haw. Rev. Stat. \(hereinafter "HRS"\) §§ 560:5-423](#) and [Haw. Prob. Rule \(hereinafter "HPR"\), Rule 42, *In the Matter of the Estate of Samuel Damon*, 119 Haw. 500, 199 P.3d 89 \(2008\)](#) and [Trone v. Smith, 621 F.2d 994, 999 \(9th Cir. 1980\)](#). The APPELLANT KITTY and her sister objected to the CONSERVATOR's multiple conflicts of interest repeatedly. RA, V.3, p.16-46; RA, V.6, p.110-116. The lower court disregarded APPELLANT KITTY and her sister's objections and allowed the conflicted CONSERVATOR to both misrepresent the legal title and ownership of assets and rely on her misrepresentations. As a result of this conflicted, incorrect and biased testimony, the CONSERVATOR was able to *8 self-deal and the lower court ruled in her favor.

B. The lower court erred in failing to enforce HRS §§ 560:1-210; 560:1-401; 560:1-410; 560:2-103; 560:2-101; 560:3-1102(3.) [In the Matter of the Estate of Laura G. Girod, Deceased, 64 Haw. 580, 582, 645 p.2d 871,___ \(Haw. 1982\)](#) and [Leone Hall Price Foundation v. Baker et al., 276 Ga. 318, 320 577 S.E.2d 779, 782 \(2003\)](#) when it did not name Chester's daughters, APPELLANT KITTY and her sister, interested parties, which would have obligated the CONSERVATOR and other parties to provide notice of all pleadings filed, thereby granting Chester's daughters standing to argue for an intestate share of their

father's assets. The lower court's error was objected to by APPELLANT KITTY and her sister in numerous pleadings. RA, V.3, p. 28-30, p. 240, 250-52; V. 5, p. 129-130; V.6, p. 14-16, 152. The lower court disregarded APPELLANT KITTY and her sister's objections and ruled that they were not interested parties.

C. The lower court erred in failing to enforce [HRS § 560:5-431](#) which obligated the CONSERVATOR to terminate, discharge and file a final accounting in the conservatorship sixty (60) days after the protected person's death. APPELLANT KITTY and her sister objected that the CONSERVATOR was not following her statutory mandate. See also [HRS §§ 560:5-420](#); [560:5-428](#); and [560:5-429](#). As a result of their objection, the CONSERVATOR filed her pleadings, however, her filings failed to authenticate Ruth's assets, nor was there an admission that Chester's intestate assets had been commingled with Ruth's assets. The inaccuracies in the final accounting under Probate Rule 26 were objected to by APPELLANT KITTY and her sister. RA, V.3, p. 24, 31; V.3, p. 255-256; V.5, p.2.

D. The lower court erred in relying on attorneys Hosoda and Tongg's supplementary documents to justify granting the CONSERVATOR's petition to compromise the claims of the settlement agreement. The lower court's improper reliance on the hearsay pleadings of an adversary, when there was no statutory procedural or evidentiary basis for it doing so, were objected to by APPELLANT KITTY and her sister and the Court's use of the deceptive and misleading pleadings were improper. *Critically, Hosoda and Tongg's supplementary documents did not answer the four* (4) conditions ordered by the lower court. RA, V. 5, p. 128-129; V. 5, p. 243-253. Ignoring the objections of APPELLANT KITTY and her sister, the lower court relied *9 on these documents to grant the petition to compromise the claims and involving the settlement agreement.

E. The lower court erred in approving the Settlement Agreement as a compromised claim which did not benefit the protected person, diminished her estate and it prevented her estate from being opened pursuant to [HRS § 560:5-425](#). APPELLANT KITTY and her sister objected to approval of the Settlement Agreement in the conservatorship as it no longer benefitted the protected person, Ruth. RA, V.3, p. 254-55. The only parties that benefitted from the Settlement Agreement were the attorneys, Hosoda, Tongg and the CONSERVATOR and, the plaintiffs in the aforesaid lawsuit, Meredith and Moreira. The lower court disregarded APPELLANT KITTY and her sister's objections allowing Ruth's assets to be disseminated outside her estate after the death of the decedent.

F. The lower court erred in not finding that Chester was the victim of undue influence by a non-related, third-party and that he was mentally incompetent at the time by reason of repeated strokes and heavy medication thereby voiding the new will. The Court should have ruled that Chester died intestate causing all transfers of property to Barbara to be fraudulent and void pursuant to [HRS § 560:2-102](#), [§ 560:5-423](#) and *Estate of Carmine Corrine Herbert*, 90 Haw. 443, 979 P.2d 39 (Hawaii 1999). See also [Jones v. Walker](#), 774 S.W.2d 532, 534 (Mo. Ct. App. 1989); [Gaines v. Frawley](#), 739 S.W.2d 950, 952, at 953-53 (Tex. Ct. App. 1987); [Succession of Hamiter](#), 519 So. 2d 341, 344-45 (La. Ct. App. 1988; [Heinrich v. Silvernail](#), 500 N.E.2d 835, 840-43 (Mass. App. Ct. 1986; [Pace v. Richmond](#), 343 S.E.2d 59, 64 (Va. 1986). APPELLANT KITTY and her sister objected to the lower court allowing Chester's assets to be commingled with Ruth's assets. RA, V.3, p. 16-43, 241-246; V.6, p. 10-12; The only remaining parties that benefitted from the Settlement Agreement were the attorneys, Hosoda, Tongg and the CONSERVATOR and, the plaintiffs in the aforesaid lawsuit, Meredith and Moreira. The lower court disregarded APPELLANT KITTY and her sister's objections.

G. The lower court erred in not finding that Chester's bank accounts held in joint tenancy with Ruth were severed and extinguished when Chester unilaterally closed the joint accounts pursuant to 534 U.S. 274, 281, 122 S. Ct. 1414, 1422, 152 L.Ed.2d 437, ___ and *Craver-Farrell, Administratrix C.T.A. of the Estate of Doris M. Dale, Deceased v. Gladys C. Anderson and Ralph L. Anderson*, 251 Va. 369, 467 S.E.2d 770, (Va. 1996). APPELLANT *10 KITTY and her sister objected to the lower court's failure to find the joint tenancies closed and the failure to return Chester's assets to his estate and his rightful heirs. RA, V.5, p.124-128. The lower court disregarded APPELLANT KITTY and her sister's objections and allowed the CONSERVATOR to both misrepresent the legal ownership of assets in the conservatorship and relied on the CONSERVATOR'S misrepresentations.

H. The lower court erred in allowing the CONSERVATOR to reverse her position, as well as allowing the other parties, Meredith and Moreira, Barbara, Hosoda, Tongg and Lee to reverse their position in order that they could gain control of Chester and/or Ruth's assets in violation of the doctrine of judicial estoppel. See *Sandra Ferraro v. Susan Camarighi*, 161 Cal. App. 4th 509, 75 Cal Rptr. 3d 19 (2008). APPELLANT KITTY and her sister objected to the lower court's failure to find the parties were judicially estopped from reversing their position in order to self-deal and ensure they received the bounty of the commingled assets. RA, V. 6, p. 14. The lower court disregarded APPELLANT KITTY and her sister's objections and allowed the CONSERVATOR to revise her position regarding Chester's intestacy.

III. STANDARD OF REVIEW

It is unclear if the clearly erroneous standard of review applies to any Points of Error listed above as the lower court never filed Findings of Fact or Conclusions of Law. Instead, the lower court relied on Minute Orders or Orders that, for the most part, avoided discussion of the issues raised. As a result it is difficult to know if APPELLANT KITTY's Points of Error apply to a clearly erroneous standard or a de novo right-wrong standard.

A. *FINDINGS OF FACT*. The probate court's findings of fact are reviewed on appeal under the clearly erroneous standard. A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the findings; or (2) despite substantial evidence in support of the findings, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made. *Waugh v. University*, 63 Haw. 117, 132-33, 621 P.2d. 957, 969 (1980).

B. *CONCLUSIONS OF LAW*. The probate court's conclusions of law are reviewed de novo under the right-wrong standard. Conclusions of law are freely reviewed for its correctness. In a de novo review, the appellate court steps into the position of the lower tribunal and decides the issue of whether the lower tribunal was "right or wrong." Conclusions of law are *11 not binding on the appellate court, but the court is free to re-examine the facts without being required to give any weight to the lower tribunal's answer. *Aiken v. Ocean View Inv. Co., Inc.*, 84 Haw. 447, 453, 935 P.2d 992 (1997). "[A] conclusion of law is not binding upon the appellate court and is freely reviewable for its correctness." *Gold v. Harrison*, 85 Haw. 94, 100, 962 P.2d 353 (1998).

IV. STATEMENT OF QUESTIONS PRESENTED

A. Whether the lower court erred when it did not find that the CONSERVATOR had a conflict(s) of interests preventing her from participating in the conservatorship proceeding?

B. Whether the lower court erred when it did not find that Chester's daughters, APPELLANT KITTY and her sister, were interested parties entitled to notice and standing?

C. Whether the lower court erred when it delayed the closing of the Conservatorship for a year and a half after the protected person, Ruth, died?

D. Whether the lower court's improper reliance on the hearsay pleadings of adversary attorneys Hosoda and Tongg, legally empower it to grant the CONSERVATOR's petition to compromise the claims of the settlement agreement and, if so, did the documents answer the four (4) conditions precedent presented by the lower court which had to be satisfied before granting the motion?

E. Whether the lower court erred when it allowed the CONSERVATOR to diminish Ruth's estate by allowing the conservancy to strip it of \$1.2 million worth of assets after her death?

F. Whether the lower court erred when it did not find that Chester was the victim of undue influence and/or mentally incompetent when he drafted his new will, thereby dying intestate as his old will had been destroyed?

G. Whether the lower court erred when it did not find that Chester retained ownership to all assets as he closed accounts that he formerly held as a joint tenant with right of survivorship with Ruth and only after this point in time, as victim of undue influence, did he put assets in the name of Barbara?

H. Whether the lower court erred when it did not find that the CONSERVATOR was judicially estopped from changing her position or allowing the other parties to reverse their position?

***12 V. LEGAL ARGUMENT**

A. THE LOWER COURT ERRED WHEN IT ALLOWED THE CONSERVATOR TO CONTINUE ACTING WHEN SHE HAD MULTIPLE CONFLICTS OF INTEREST

The CONSERVATOR let herself be drawn into multiple levels of conflict of interest in several proceedings in spite of her duty to be an officer of the Court and remain impartial to her sole client the protected person, Ruth. The lower court erred when its rulings allowed the CONSERVATOR'S conflicts of interest to continue and the court failed to protect interested parties, the parties whom were owed a fiduciary duty of loyalty and interests of the protected person, Ruth. The CONSERVATOR'S multiple conflicts of interest can be summarized as follows:

First, the CONSERVATOR participated in civil litigation, without authority, against the caregiver, Barbara, for which she asked to be paid without ever seeking permission from the lower court to participate in litigation on behalf of the protected person.¹²

Second, the CONSERVATOR asked and was granted the right to distribute assets in Ruth's conservatorship for claims which had nothing to do with the care of Ruth after Ruth's death,¹³ when she knew that the assets should have been first probated in Chester's estate and *13 Ruth's estate would have a share of the augmented estates.

Third, the CONSERVATOR was in conflict of interest to her fiduciary duty to Ruth because she allowed assets to pass OUTSIDE of Ruth's conservatorship to third persons- *without probating Ruth's estate* - diminishing the assets which should be turned over to Ruth's estate.

Fourth, as CONSERVATOR she was in direct conflict with Chester's heirs who needed to litigate his estate claims against third parties who violated Ruth's estate and Chester's estate.

Fifth, while a CONSERVATOR for Ruth, she petitioned the lower court to appoint her the Personal Representative of Chester's estate and for a determination that Chester died intestate without a will. Her fiduciary duty to Chester's estate and his prospective heirs were in sharp conflict with her duty to Ruth, the protected person for whom she was the CONSERVATOR.

Sixth, opening an intestate probate for Chester was in direct contradiction to the CONSERVATOR's pleadings in which she posited over and over again that Chester's new will was valid and that the Settlement Agreement, based on the new will, should be enforced which is a violation of the basic principle of judicial estoppel.

Seventh, the CONSERVATOR's delay in closing the conservatorship was not beneficial for her client, Ruth, or to Chester but only to herself, Meredith and Moreira, Hosoda, Barbara, Tongg, and Mitzi Lee ("Lee") who needed the time to distribute all the assets in the conservatorship, primarily to themselves, robbing and spoliating APPELLANT KITTY and her sister's right to Chester's estate.

Clearly the lower court erroneously and improperly empowered the CONSERVATOR to not only have multiple conflicts of interest, but also to violate her statutory duties to Ruth's *14 conservatorship, Chester's estate, and her duties as an officer of the court and her duties to protect Chester's heirs. Further, as the equivalent of a trustee, she owes a duty to the court to advise

the court if she finds beneficiaries or anyone knowingly attempting to violate the security of assets in the estates of Ruth or Chester and she failed and/or refused to do so in violation of her pledge and duty under oath.

The CONSERVATOR is required by law to avoid any transaction involving a conflict of interest pursuant to [HRS § 560:5-423](#),¹⁴ which states, “Any transaction involving the conservatorship estate that is affected by the substantial conflict between the conservator's fiduciary and personal interests is voidable...” Further, “A transaction affected by a substantial conflict between personal and fiduciary interests includes any sale, encumbrance or other transaction involving the conservatorship estate entered into by the conservator, or a corporation or other enterprise in *which the conservator has a substantial beneficial interest*.”

In the Matter of the Estate of Samuel Damon, the Master was disqualified for a conflict of interest in having participated with his law firm and actions in violation of HPC 1.9(a) and Revised Code of Judicial Conduct (RCJC) (1992) for the “mere potential” of a breach which may have tainted his finding in this case. [119 Haw. 500, 199 P.3d 89 \(2008\)](#). According to this Court, Masters are held to the standard of Judges and must avoid all appearances of impropriety stating, “Rule 1.9 is designed to address not only the narrow need to protect a client's confidences, but also to establish broader standards of attorney loyalty and to *maintain public confidence in the legal system*.” *Id.* (emphasis added, citation omitted). It is in this capacity that the master essentially “serves as the eyes and ears of the court,” and “shall be a person who has no conflict of interest with any party or issue in the proceeding.” [HPR Rule 28\(a\)](#).¹⁵

***15** If a Master must prevent a mere “potential” of a conflict of interest in a probate proceeding, a CONSERVATOR, also a court-appointed professional, has a far greater obligation and fiduciary duty to the protected person, the beneficiaries, the heirs, and the Court. Here, the CONSERVATOR was nominated by the Court as a fiduciary, is the fiduciary herself, the attorney for the fiduciary, and the fiduciary for the Estate and the Court and participated in both the lower court proceedings as well as the civil lawsuit proceedings with parties to whom she aligned herself and paid funds from the conservatorship of \$64,365.09, and paid herself fees of \$90,000. The CONSERVATOR's behavior is far beyond the “mere potential” of a breach of her duties as a fiduciary, she flagrantly **abused** her position and the lower court allowed her to do it. In this case, the parties who were owed fiduciary duties did not share any common interests and when the CONSERVATOR picked sides, the interests of Chester's heirs, APPELLANT KITTY and her sister, were abandoned in favor of the CONSERVATOR's allegiance to the parties who benefitted from the distributions from Rut's Conservatorship. This breach of her fiduciary duties to Chester's heirs is an indefensible position.

B. THE LOWER COURT ERRED WHEN IT FAILED TO DESIGNATE APPELLANT KITTY AN INTERESTED PARTY WITH STANDING WHO WAS ENTITLED TO NOTICE OF ALL PLEADINGS FILED IN THE CONSERVATORSHIP PURSUANT TO [HRS §§ 560:1-201, 560:2-101](#) and [560: 1-410](#)

Initially parties in this case, including the CONSERVATOR, happily accepted Barbara's representations that she did not know how to contact Chester's daughters, although every *other* assertion that Barbara made with respect to monies, real estate, the competence of Chester or Ruth were all put under a microscope to search for the truthfulness of Barbara's statements. Due ***16** to the pressure of possible criminal charges¹⁶ in the lawsuit, Barbara agreed to the Settlement Agreement even though its terms required that she turn over all of the assets which she had taken control of, but which originally belonged to Chester and/or Ruth, to the CONSERVATOR and other parties and exclude APPELLANT KITTY and her sister.

As a result the CONSERVATOR and other parties in the aforementioned related proceedings, failed to comply with [HRS § 560: 1-410](#) which *requires notice to an interested person* fourteen (14) days before a hearing and if their address is unknown, then reasonable diligence should be exerted to determine same. In this case, failure to exert “reasonable diligence” to find Chester's children at the beginning of the lawsuit resulted in their being unfairly prejudiced, alienated from the settlement proceedings and deprived of the their father's estate and assets which went to parties other than Chester's children.

HRS § 560:1-201 defines “interested person” as “children”. HRS § 560:2-103 states that “decedent's descendants” are entitled to participate in an intestate distribution. HRS § 560:2-101 states generally that if an estate passes without a controlling will, that estate shall be distributed pursuant to intestate statutes. Furthermore, HRS § 560:1-401 states the notice requirements shall be given “to any interested person or the person's attorney if the person has appeared by attorney.” The statute defines an interested person as including, “[A]ny others hav[ing] a property right in or claims against a trust estate or the estate of a decedent, ward, or protected person.” HRS § 560:1-201. Clearly, the definition includes APPELLANT KITTY and her sister, daughters of Chester, and that they should be granted standing as interested persons. The CONSERVATOR knew of APPELLANT KITTY and her sister and was obligated to follow HPR, Rules 1, 7, and 105 which required notice to APPELLANT KITTY and her sister of all documents filed after receipt of her letter on December 27, 2007 asking to participate in the Settlement Agreement.¹⁷

*17 Notice is essential when a settlement involves assets of a decedent and his heirs are interested persons with a claim on the assets. A case similar factually to the instant case, *In the Matter of the Estate of Laura G. Girod, Deceased*, ruled, “We see no reason why the procedure, set forth in § 560:3-1102(3), giving notice to all interested parties, should not have been followed in this case.” 64 Haw. 580, 582, 645 p.2d 871, ___ (Haw. 1982). *Girod* argued that HRS § 560:3-1102 (3) requires that notice be given to all heirs when there is a contest over the validity of a will before approval of any settlement. *Id.*

Similarly *Leone Hall Price Foundation v. Baker et al.* found the Foundation did have a financial interest and standing, therefore, its consent was necessary to the settlement, without which it could not constitute a complete agreement of all beneficiaries in spite of Appellee's arguments to the contrary. 276 Ga. 318, 320, 577 S.E.2d 779, 782 (2003).¹⁸

C. LOWER COURT WAS REQUIRED TO TERMINATE, APPROVE CONSERVATOR'S FINAL REPORT, AND DISCHARGE CONSERVATOR WITHIN SIXTY (60) DAYS OF THE DEATH OF THE PROTECTED PERSON

The probate laws are quite clear that upon the death of a protected person, HRS § 560: 5- *18 428, Death of a Protected Person, the Conservator shall bring a Petition in Probate relating to the Will, or if not a Will, an Intestate proceeding. Critical to this case, HRS § 560: 5-431, requires the Conservator to terminate the Conservatorship upon the death of the protected person or upon Order of the Court. Within 60 days of the death of the protected person or upon Order of the Court, the Conservator is required under HRS § 560: 5-431(b) to file a final report (contents detailed in HRS § 560: 5-420) and Petition for Discharge. Under HRS § 560: 5-431(e) upon termination of a Conservatorship, the order of termination shall provide for title to assets of the Estate to pass to the former protected person or the person's successors in interest. See also HRS § 560: 5-429. Further, a Conservator shall “retain the estate for delivery to the Personal Representative of the decedent or to another person entitled to it.” Any failure to observe these rules can result in liability “to any person aggrieved for any damages that may be sustained by the failure, and the court may award treble damages.” All of these proceedings are required to be accounted for and decided by a Court sitting in Probate as required under Rule 119, HPR, and HRS § 560: 5-428 and 560: 5-429.

When Ruth died, the CONSERVATOR had one obligation and that was to wrap up the conservatorship and turn over all assets to Ruth's estate. In contrast, the Conservator filed petitions to compromise claims worth over \$1.2 million dollars in the conservatorship after the protected person's death. It was only after APPELLANT KITTY and her sister objected to the petitions, which they found accidentally, that the CONSERVATOR belatedly filed an inaccurate accounting and schedule of property asking to be discharged. *Critically, she did not withdraw her improper petitions even after being noticed that they were improperly filed.*

The lower court then erred when it allowed the conservatorship to remain open for almost a year after the protected person, Ruth, died. There were clearly adverse positions questioning the ownership and title of the assets in the conservatorship. There was no effort to retain title to conservatorship assets to pass on to the protected person's estate as the statutes require, in fact, the exact opposite was true, instead of retaining title to all assets, the CONSERVATOR literally divested the estate of the majority of its assets and removing them from the estate entirely. The lower court failed to assemble all interested parties to allow an intestate Estate to be opened for Ruth and title to all assets be transferred to her intestate Probate for proper distribution. The

estates of Chester and Ruth should have been properly opened and allowed to litigate who had *19 the rights to those assets. Chester's estate had a right to be included in the Settlement Agreement litigation as well.

D. ERROR WHEN LOWER COURT RELIED ON ATTORNEY'S SUPPLEMENTARY DOCUMENTS TO JUSTIFY APPROVING CONSERVATOR'S PETITION TO COMPROMISE CLAIM OF SETTLEMENT AGREEMENT

In order to approve the CONSERVATOR'S filing for a final accounting, discharge and termination of the conservatorship, the lower court required conflicted legal counsel to file unverifiable and unsubstantiated supplementary documents stating that: 1) all property subject to the Settlement Agreement was property of the protected person, Ruth; 2) the Settlement Agreement does not involve claims or property that relate to Chester; 3) pursuant to the Settlement Agreement the specific amount of attorney's fees and costs to be paid to counsel, Hosoda and Tongg; and 4) the reason the lower court should approve the reimbursement of the attorney's fees and costs and payment to Barbara out of Ruth's conservatorship. APPELLENT KITTY and her sister objected to the lower court's use of Tongg¹⁹ and Hosoda²⁰ affidavits as *20 evidence in violation of the evidence code to prove the CONSERVATOR'S improperly filed petitions to compromise claims. Any supplementary documents filed by legal counsel - whom hoped to receive attorney fees and costs based on their statements - could not possibly replace the lower court's legal analysis of the issues and a formal statement and is unsubstantiated hearsay. Furthermore, reliance on third-party affidavits allowed the lower court to escape ruling *21 on legal issues which could result in negative precedent affecting other probate/guardianship cases in the court. In a worse case scenario, counsel could swear to their belief that no property is from Chester's estate and not state the reason they believe this is true.

E. TERMS OF SETTLEMENT AGREEMENT DID NOT BENEFIT PROTECTED PERSON; INSTEAD THE PRIMARY BENEFICIARIES WERE ATTORNEYS, BARBARA AND MEREDITH AND MOREIRA.

The terms of the Settlement Agreement, which the CONSERVATOR petitioned the lower court to compromise in the conservatorship, were not even relevant after the protected person died. Instead of benefitting the protected person, Ruth, it bypassed Ruth's estate and primarily transferred the wealth from Chester and Ruth to Meredith and Moreira, Barbara, and paying attorneys fees and costs to the CONSERVATOR, Hosoda, Tongg and eventually Lee. RA, V. 6, p. 14. The Settlement Agreement can be broken down into four parts. Twelve (12) paragraphs only applied if the protected person, Ruth, was alive. RA, V.3, p. 387, at ¶¶ 2, 3, 4, 5, 6, 7, 8, and 12. Three (3) paragraphs involved the transfer of title to a car, return of jewelry and photographs. Id. at ¶¶ 9, 10-11. However, of utmost importance to the CONSERVATOR, seven (7) paragraphs then transferred the bulk of Chester and/or Ruth's wealth to Meredith and Moreira, Barbara, legal counsel's fees and the CONSERVATOR. Id. at ¶¶ 15, 17, 18, 19, 20, 21, and 23.

Originally the CONSERVATOR justified her CONSERVATOR fees stating the global settlement agreement, reached by a limited number of parties in the civil lawsuit, gave her authority to be paid attorney fees and costs for filing the improper above-listed three (3) petitions. APPELLANT KITTY and her sister objected as Hawaii's statutes did not grant the lower court authority to allow attorney fees and costs to a CONSERVATOR who filed untimely pleadings after the protected person has died when such pleadings were clearly improperly filed and were outside of her authority and duties at the time of her filings. In fact, the CONSERVATOR continued to pay herself attorney fees for her services long after the protected person had died but attaches no itemization of cost, time and expenses nor an Affidavit of Fees and Expenses.

In addition to requesting payment of her own improper fees, over the course of the next year the CONSERVATOR would pay thousands of dollars in attorney fees for Hosoda, Lee and Tongg out of the conservatorship long after the protected person died without seeking the lower court's approval or providing notice to the public. The Conservator's first final accounting *22 showed \$394,419.98 held by the Conservator on May 15, 2008. Nine months later, on February 6, 2009, the CONSERVATOR filed a second final accounting showing the CONSERVATOR's payout of an additional \$269,365.09 from the Conservatorship, leaving a balance only of \$172,593.06. No Court Order was ever issued by this Court for the disbursements made by the

CONSERVATOR during the period June 15, 2008 to October 1, 2008. These payments were primarily for attorney fees of \$128,836.42 and \$43,779.64 to Hosoda, the payment of \$33,409.21 to Tongg, attorney for the wrongdoer Barbara, together with an additional payment of \$13,201.15 to Tongg's Client Trust Account.

APPELLANT KITTY and her sister objected to these payments as there was no justification, receipts or explanations are given for the disbursements, nor did the lower court formally approve the disbursements, nor was notice given to interested parties *prior to the disbursements*. Further, in violation of HPR 26, the filing of the CONSERVATOR has no explanation whatsoever of where the funds came from except to say that the holdings of the conservatorship during said accounting period consisted of "collecting funds from financial institutions and placing them in a Conservatorship Account which generated interest." RA, V.3, p. 24, 31; V.3, p. 255-256; V.5, p.2. By failing to itemize the source of the funds, the CONSERVATOR concealed whether or not the funds came from bank accounts that Chester controlled which did not belong to the conservatorship, rather it belonged to Chester's estate. Most importantly, the CONSERVATOR'S payment of these fees and costs from the May 15, 2008 accounting in the conservatorship was improper as the funds should have been transferred to a formal estate proceeding in which Ruth's estate and Chester's estate could litigate over the rightful ownership of the funds.²¹

***23 F. THE LOWER COURT ERRED WHEN IT DID NOT FIND THAT JOINT TENANCIES WITH RIGHTS OF SURVIVORSHIP HELD BY RUTH AND CHESTER HAD BEEN EXTINGUISHED AND SEVERED AS CHESTER HAD CLOSED ALL JOINT ACCOUNTS THAT HE HELD WITH HIS WIFE PRIOR TO HIS DEATH.**

During hearings held before the lower court on June 13, 2008, and June 20, 2008, critical facts were omitted in discussions regarding whether Ruth's estate held any assets which should be located in the estate of Chester. The CONSERVATOR told the lower court that she asked the bank attorneys what happens when a joint tenancy is opened.²² This is not the legally relevant question. Instead the CONSERVATOR should have asked the bank attorneys what happens to the right of survivorship when a joint tenancy is closed by one of the joint tenants and the money is given solely to Chester? Closure of jointly held accounts by one joint tenant is one of the rights of a jointly held account, thus, Chester's act of closure of the joint tenancy accounts severs and extinguishes Ruth's right of survivorship in those accounts forever.²³ Those assets from the *24 closed joint accounts belonged to Chester exclusively, however, in error those accounts were either turned over to the CONSERVATOR or was the property improperly being contemplated by the Settlement Agreement which the CONSERVATOR Is asking this Court to wrongly Compromise.

The U.S. Supreme Court in *United States v. Craft* ruled that "Like joint tenants, tenants by the entirety enjoy the right of survivorship. Also like a joint tenancy, unilateral alienation of a spouse's interest in entireties property is typically not possible without severance. *Unlike joint tenancies, however, tenancies by the entirety cannot easily be severed unilaterally.* 4 Thompson § 33.08(b)." 534 U.S. 274, 281, 122 S. Ct. 1414, 1422, 152 L.Ed.2d 437, _ (emphasis added). By inverse deduction, this high Court's ruling supports that it is *easy* to sever a spouse's interest unilaterally in a *joint tenant* account.

Common law further instructs that severance of a joint tenancy title takes place when any one of the four essential unities of title for a joint tenancy had been broken, i.e. the unity of interest, the unity of title, the unity of time and the unity of possession. See William Blackstone, II Commentaries on the Laws of England, Chap. 1, 3 (Wayne Morrison ed., 2001) (1765-1769); See also 4 Thompson § 33.08(b).

Finally, the court ruled in *Craver-Farrell, Administratrix C.T.A. of the Estate of Doris M. Dale, Deceased v. Gladys C. Anderson and Ralph L. Anderson*, "Since the trial court erred in applying the presumption of survivorship provided in [Va. Ann.] Code § 6.1-125.5(A) to funds which had once been held in joint accounts but which were no longer so held at the time of the death of one of the parties to those accounts, the judgment concerning those funds is reversed and the case remanded." 251 Va. 369, 467 S.E.2d 770, (Va. 1996) The *Craver-Farrell* court ruled *25 that these assets should be taken away from the defendants and given directly to the decedent's daughter with interest since the joint tenancies had been closed. *Id.* at 251 Va. 372, 467 S.E.2d 772.

Applying black letter law to this case, Chester severed Ruth's interest in numerous accounts when he unilaterally closed and liquidated the funds. This ability for Chester to unilaterally sever Ruth's interest is an understood privilege of a joint tenancy. By setting the account up as a joint tenancy prior to his death, one has consented to the legal right of the other joint tenant to liquidate the account and sever or extinguish the joint tenancy forever. Therefore, when the law is properly applied to the facts in this case, the analysis according is twofold: first, there are assets in Ruth's Conservatorship which should be part of Chester's estate and, second, as a result, Kathleen Mikatich and Dianne Frazier are interested persons as defined by Hawaii statutes with a legitimate claim against Ruth's estate.

G. LOWER COURT ERRED IN NOT FINDING CHESTER WAS THE VICTIM OF UNDUE INFLUENCE AND/OR WAS MENTALLY INCOMPETENT THEREFORE THE NEW WILL WAS INVALID AND CHESTER DIED INTESTATE

The lower court erred when it failed to correct the CONSERVATOR for her improper legal argument that Chester was not unduly influenced and mentally incompetent. The lawsuit filed by Meredith and Moreira showed that Barbara, the Caregiver, had exerted such undue influence over Chester that his mental controls were overcome. As a result Chester's will gave property to a stranger who normally would not have received the inheritance as his sole beneficiary, the caregiver, was not a natural heir and she had displaced natural heirs. Based on the factors other courts consider to analyze whether there has been undue influence exerted upon a testator, APPELLANT KITTY and her sister clearly showed²⁴ these factors existed at *26 the time Chester drafted a new will on January, 2007:

- Presence of the beneficiary when the will was executed;
- A confidential relationship between the alleged influencer and the testator;
- Presence of the beneficiary when the testator discusses his or her intentions;
- Recommendation by the beneficiary of an attorney to draft the will;
- Knowledge by the beneficiary of the contents of the will;
- Instructions made to the attorney by the beneficiary;
- Securing of witnesses for the will by the beneficiary; and
- Possession of the will by the beneficiary after its execution.

See e.g., *Jones v. Walker*, 774 S.W.2d 532, 534 (Mo. Ct. App. 1989) [whether a “confidential relationship” existed between the alleged influencer and the testator and whether the influencer was actively involved in procuring the will]; *Gaines v. Frawley*, 739 S.W.2d 950, 952, at 953-53 (Tex. Ct. App. 1987) [whether the influencer was actively involved in procuring the will]; *Succession of Hamiter*, 519 So. 2d 341, 344-45 (La. Ct. App. 1988) [whether the influencer was actively involved in procuring the will and the degree to which the business or financial affairs of the testator were controlled by the alleged influencer and the length of the relationship between the testator and the beneficiary]; *Heinrich v. Silvernail*, 500 N.E.2d 835, 840-43 (Mass. App. Ct. 1986) [whether and to what extent the testator was susceptible to influence and whether and the extent to which the testator obtained advice from other than the alleged influencer, either from a disinterested attorney or from other friends and family members]; *Pace v. Richmond*, 343 S.E.2d 59,64 (Va 1986) [whether and to what extent the testator was susceptible to influence].

Further, Chester was *mentally incompetent* at the time he drafted a new will such that he should not be allowed to give \$1.2 million in assets to a caregiver he had only met two and one- *27 half years earlier, disinheriting his wife, his daughters and his

wife's niece and nephew and then allow Barbara to give the bulk of the assets back to just the niece and the nephew. However, the issue of Chester's competence is clearly in question since "a gift by a person in a very decrepit state, shortly before his death, to someone who is not a natural object of his bounty will obviously not enlist as sympathetic an attitude as a normal and equitable disposition made in the prime of life." Ashbel G. Gulliver & Catherine J. Tilson, "[Classification of Gratuitous Transfers](#)" 51 Yale L. J. 12 (1941).

A seminal Hawaii case has ruled that despite evidence of the testator's mental acuity the decedent's last will was a product of undue influence and would not be enforced. [Estate of Carmine Corrine Herbert](#), 90 Haw. 443, 979 P.2d 39 (Hawaii 1999). Based on the ruling in *Estate of Herbert*, Chester's new will, executed under the undue influence of the non-related, third-party sole beneficiary, should not be enforced in this case either. In this case, Chester was obviously preyed upon by the caregiver at a time when his wife had been incapacitated by [Alzheimer's disease](#) and needed twenty-four hour care and he himself had been severely injured in a parking lot auto accident four years earlier on November 17, 2003. Chester's ability to resolve his own problems was highly diminished and he found himself in a position of being dependent on the Barbara to help him care for his own failing physical and mental health, as well as his wife while she was afflicted with [Alzheimer's disease](#).

In a similar case, the Ninth Circuit Court of Appeals ruled that the close friend, Thomas Paskvan, of an **elderly** man beset with various health problems, Pete Miesch, should not be allowed to profit from the conveyance of the **elderly** man's assets into his name, *even though a finding of mental incompetence was not formally reached until ten years after his property was conveyed*. [Thomas Paskvan v. Pete Mesich, an incompetent person, by his Guardian, Blazo N. Bigovich](#), 227 F.2d 646 (CA 9th 1955). Paskvan found, "In such a situation, other elements are given weight. If there is a close personal relationship between the parties, even though it does not approach a fiduciary character, a different atmosphere is created. Knowledge of the mental infirmity of another by one who receives a benefit is a circumstance which may convince the trier of fact that a course of conduct is demonstrative of fraud." *Id.* at 651. Paskvan ruled that the evidence likewise supports the trial court's finding that, "knowing of the mental incompetence and disabilities, Paskvan ingratiated himself into the confidence of the plaintiff *28 and, fraudulently [took] advantage of plaintiff's mental and physical infirmities and incompetence." *Id.* The Court concluded that although the normal rule was to return the plaintiff to the status quo with an offset for costs incurred by the defendant, "[T]his is a court of equity and the course of events has been such that any contributions of defendant have been clouded by the main purpose of defrauding plaintiff" and refused to offset any of Defendant's costs or labor. *Id.* at 651-52.

The argument that undue influence was not a court finding in the lawsuit, therefore, Chester intended to write the new will and all assets should rightfully be given to Barbara who is then is free to give most of it back to Ruth's niece and nephew, is hopelessly self-serving and clouds the real issue. The real issue is Ruth's heirs, a niece and nephew, believe they have collected the whole pie and they simply do not want to share this pie, or any part of it, with Chester's rightful descendants. *The fact there was no formal order or finding adjudicating that Chester was the victim of undue influence or that he was mentally incompetent at the time of writing his new will, therefore, his new will -- which gave everything to a non-family member who orchestrated his new will -- is not reasonable nor judicially credible.*

H. JUDICIAL ESTOPPEL

The court in [Sandra Ferraro v. Susan Camarlighi](#) grappled with a hauntingly similar fact pattern as is found in the instant case. 161 Cal. App. 4th 509, 75 Cal Rptr. 3d 19 (2008). The court in *Ferraro* determined several issues of interest to the case at hand, but most critical to this case is its reliance on the doctrine of judicial estoppel, "a party who has taken a particular position in litigation may, under some circumstances, be estopped from taking an inconsistent position to the detriment of the other party." *Id.* at 558, 75 Cal. Rptr. 19, 104. Explaining the social injustice if this doctrine was not available, the *Ferraro* court ruled:

This doctrine rests on the principle that litigation is not a war game unmoored from conceptions of ethics, truth and justice. It is quite the reverse. Our adversarial system limits the affirmative duties owed by an advocate to his adversary, but that does not mean it frees him to deceive courts, argue out of both sides

of his mouth, fabricate facts and rules of law, or seek affirmatively to obscure the relevant issues and considerations behind a smokescreen of self-contradiction and opportunistic flip-flops.

Id. at 558, 75 Cal. Rptr. 19,104.

In this case, the CONSERVATOR and Hosoda, representing Meredith and Moreira, have *29 reversed their positions and the lower court should have ruled that Chester died intestate as the CONSERVATOR stated on January 29, 2008 and they were judicially estopped from arguing that Chester died with a valid will justifying approval of the Settlement Agreement from which they benefitted.

VI. CONCLUSION

This Appeal is a history of the contumacious litigation by third persons and a Court appointed fiduciary whose actions have had a direct, if not tragic, effect of divesting true beneficiaries of the right to their expected inheritances. It is inconceivable but true that the litigants have been able to circumvent the legitimate probate process of this State to transfer assets to their own account without supervision. The inconvenient truth of this case is that it has happened and now it is time to rectify the misdeeds and revise this series of errors. This Court can either rule on the questions now an/or send this matter back to be corrected by the lower court. The assets taken from Chester V. Scupholm must be restored to his own Probate estate and distributed intestate to heirs of the Estate of Ruth and Chester as contemplated by the Probate Code. No amount of argument can justify the misrepresentation of the truth in this case.

Footnotes

- 1 Ruth's niece and nephew, Karen L. Meredith and Jeffrey Moreira (hereinafter "Meredith and Moreira"), filed a Complaint against Barbara J. Rapisora in *Karen L. Meredith, et al. v. Barbara J. Rapisora, et al.*; Civil No. 07-1-1018 (hereinafter "Meredith lawsuit"), alleging numerous counts which can be summarized as follows: Undue Influence, Duress, Breach of Fiduciary Duties, Tortious Conversion, Unfair & Deceptive Trade Practices, Wrongful Death, Tortious Interference with Inheritance, Negligence, Unjust Enrichment and Punitive Damages.
- 2 The lawsuit filed by Ruth's niece and nephew, Meredith and Moreira, alleged that Chester's new Will was not valid as it named his caregiver, a non-related, third-party, Barbara J. Rapisora (hereinafter "Barbara"), as sole beneficiary while simultaneously disinheriting his wife, his daughters and his wife's relatives. RA, V.1, p. 49-64; V.2, p.146-160. In addition, on or about the time Chester was being unduly influenced to write a new Will making Barbara the sole beneficiary, he liquidated his joint accounts with his wife and opened new bank accounts, sometimes naming Barbara as joint tenant with rights of survivorship, as well as naming her as joint tenant with rights of survivorship on a house he purchased with checks from his personal checking account for \$729,000. *Id.* Meredith and Moreira's lawsuit further alleged that Chester's new Will was the product of the undue influence because it was written at the time Chester was mentally incompetent, on heart medication and a victim of repeated strokes, and therefore, the new Will should be ruled invalid and all transfers of assets to Barbara should be voided. *Id.*
- 3 On February 4, 2008, APPELLANT KITTY and her sister filed a "*Motion to Intervene and Rule 19 Joinder of Persons Needed for Just Adjudication and Motion for a Rule 59(E) Alteration or Amendment of Judgment and/or Alternatively Motion for Rule 62(B) Stay of Proceedings To Enforce Judgment Granting Plaintiff's Motion To Enforce Settlement Agreement, filed December 28, 2007*" in the lawsuit, Civ. No. 07-1-1018. On March 14, 2008, this motion was heard by the Honorable Sabrina S. McKenna, with legal counsel for Meredith and Moreira, and Barbara opposing Chester's daughters' intervention as well as the CONSERVATOR who also ultimately opposed Appellants' intervention. The Court issued an Order denying APPELLANT KITTY and her sisters' motion to intervene in the lawsuit on April 9, 2008 and a Notice of Appeal was timely filed on May 8, 2008. An Opening Brief was filed on September 17, 2008. See "*Karen L. Meredith, individually and in her capacity as Guardian of Ruth Scupholm; and Jeffrey Moreira, Plaintiffs-Appellees, vs. Barbara J. Rapisora; Brandon C. Lau and Prudential Locations, LLC, Defendants-Appellees and John Does 1-10, and Doe Entities 1-10, Defendants-Appellees, and Kathleen M. S. Mikatich and Dianne M. S. Frazier, Intervenor/Descendents-Appellants*", No. 29148, Intermediate Court of Appeals of the State of Hawaii.

- 4 Originally Ruth's Conservatorship had been opened by her caregiver Barbara, but on August 28, 2007, Ruth's niece and nephew, Meredith and Moreira, contested Barbara's request to be appointed Ruth's conservator and guardian. RA, V.1, p. 49-64. On August 29, 2007, a confidential Kokua Kanawai report was prepared and filed by Lori Ohinata, to inform the court as to the status of the protected person, Ruth, who was being cared for full-time by Barbara.
- 5 Meredith and Moreira were the plaintiffs in the original lawsuit and the main beneficiaries of the Settlement Agreement distributing Chester and/or Ruth's assets after Ruth's death. This Settlement Agreement relied on the legal theory that Ruth controlled Chester's assets as well as her own. RA, V.3, p. 160-70.
- 6 It was not until December 20, 2007, that Chester's daughters received their first notice of their father's death when Barbara telephoned to notify them. RA, Vol.3, p. 22, 35-45. After Barbara detailed the lawsuit and the Settlement Agreement she was being forced to accept, APPELLANT KITTY and her sister immediately advised the CONSERVATOR by faxed letter that they desired to participate in the settlement discussions distributing their father's assets. *Id.* At the same time, APPELLANT KITTY and her sister sent similar notices to legal counsel for the remainder of the parties participating in the Settlement Agreement, i.e. Tongg, legal counsel for Barbara, received a fax dated December 26, 2007, and Hosoda, legal counsel for Meredith and Moreira, received notice on December 27, 2007. *Id.*
- 7 On December 13, 2007, a mediation to settle this lawsuit was held before (RET.) Honorable Ricki May Amano in which the parties agreed orally to distribute all assets discovered in the name of Chester and/or Ruth in the Settlement Agreement, however, no final document was executed. From December 13 through December 31, 2007, the wording of the Settlement Agreement continued to be revised and edited. All parties had not executed the Settlement Agreement at the time APPELLANT KITTY and her sister contacted the CONSERVATOR and asked to participate. Barbara refused to sign the agreement until Chester's daughters participated in the distribution.
- 8 On December 24-27, 2007, APPELLANT KITTY and her sister sent either a fax or letter to all parties requesting to participate in the settlement discussions. After receipt of their letter, Meredith and Moreira filed an "*Ex Parte Motion to Shorten Time for Hearing on Plaintiffs' Motion to Enforce Settlement*" with a companion pleading "*Plaintiffs' Motion to Enforce Settlement*" asking the court to enforce the mediated settlement agreement and did not serve notice on APPELLANT KITTY or her sister. Hosoda's attached Declaration specifically noted that he had received APPELLANT KITTY and her sister's request to participate prior to filing his client's pleadings. RA, Vol.3, p. 22, 35-45.
- 9 On January 29, 2008, the CONSERVATOR filed three (3) documents opening *The Estate of Chester V. Scupholm* (hereinafter "Chester's Estate"), Probate No. P08-1-0053, and accepting appointment as his Personal Representative: 1) "*Petition for Adjudication of Intestacy and Appointment of Personal Representative*"; 2) "*Acceptance of Appointment*"; and 3) "*Inventory*" and serving notice on APPELLANT KITTY and her sister. RA, V.3, p. 264-65. After the CONSERVATOR filed to open Chester's intestate probate, on February 7, 2008, APPELLANT KITTY and her sister filed a pleading to inform the court of their interest in their father's estate. On April 11, 2008, APPELLANT KITTY and her sister filed an amended intestate inventory for their father and asked to be substituted as Co-Personal Representatives for their father's estate once they learned the CONSERVATOR was asking the lower court to approve the settlement agreement in Ruth's conservatorship. On April 21, 2008, in Chester's Estate, the CONSERVATOR, as Personal Representative of Chester's Estate filed her response, "*Memorandum Regarding Petition for Substitution of Co-Personal Representatives for the Estate of Chester V. Scupholm, filed on April 15, 2008*". The CONSERVATOR then later filed a pleading asking to withdraw as Personal Representative of Chester's Estate on May 8, 2008.
- 10 On May 29, 2008 through June 30, 2008, Karen L. Meredith filed her "Application for Appointment of Personal Representative" and other asundry pleadings to open "*The Estate of Ruth Scupholm*", P. No. 08-1-0289. Meredith's filings went unopposed as she had priority as the niece of the deceased and Ruth's estate was successfully opened. At the same time, APPELLANT KITTY and her sister sought to be appointed as the Co-Personal Representatives of their father's estate stating they had statutory priority as his sole descendants in order to have standing as a fiduciary to defend or litigate any claims that Chester's estate may have against Ruth's estate and any third party. Karen L. Meredith then filed a competing petition requesting to be Chester's Personal Representative, based on the fact she was as the Personal Representative of *The Estate of Ruth Scupholm*. This matter is currently in a contested case hearing before Judge Gary W. C. Chang and on March 11, 2010, recently granting APPELLANT KITTY's motion for reconsideration which allowed for the estate of Chester to be opened after discovery of all bank accounts revealed the possibility that assets existed at the time of Chester's death.
- 11 The CONSERVATOR, Hosoda on behalf of Meredith and Moreira, and Tongg on behalf of Barbara met with Judge Sabrina S. McKenna and crafted a second Settlement Agreement filing it on October 31, 2008. The negotiations of the second settlement agreement took place without serving notice on APPELLANT KITTY and her sister while they were waiting for this Court's decision regarding their denial of their motion to intervene as necessary parties.
- 12 Having discarded Chester's Will as a product of undue influence, the parties at mediation determined what amounts and to who Chester and/or Ruth's estate should be distributed to without regard for Chester's heirs. In this instance, the conflict of interest is glaring. The

CONSERVATOR was party to a mediation which allowed all Chester's assets to be given to Ruth's family, Ruth's family's attorneys, Barbara and her attorney and the CONSERVATOR. The parties who were going to share in Chester's estate by way of the mediated settlement agreement opposed efforts by APPELLANT KITTY and her sister's to intervene. None of the funds were to be paid to Chester's family in spite of the fact it was Chester's Will which was literally being disassembled and put back together again.

- 13 The Settlement Agreement had been carefully camouflaged to look simply like another innocuous creditor claim for Ruth. When one carefully considers the difference between the petition, filed to compromise the mediated settlement agreement, and the other two petitions filed on the same day, it becomes clear that the differences in the captions could only be the result of a strategic effort to hide the significance of this particular pleadings from APPELLANT KITTY and her sister and other interested parties. Specifically the pleading did not label in its caption what claim was being compromised, but the other two pleadings included the name of the claim, the Kahala Garden claim and the Dr. Lau claim, being compromised in their captions. As a result, the CONSERVATOR ensured that it was impossible to find the compromise of the mediated settlement agreement either by reviewing the court docket on the lower court's website, the Ho'ohiki search engine, or on the docket list in the lower court's file room. Instead discovery of the pleading would only happen if every related proceeding in the court files was searched and reviewed the exhibits attached to the petition if they found it. Nor was there anything in CONSERVATOR's petition itself to alert this Court that the settlement agreement, with its attached exhibit, would ultimately dispose of hundreds of thousands of dollars, possibly even over a million dollars even though all parties had clear knowledge that the mediated settlement agreement was being disputed by Chester's heirs who believed this distribution to be in violation of Hawaii's probate laws.
- 14 Further, under HPR Rule 42, Conflicts of Interest, the Conservator, as a fiduciary, is an officer of the Court under Rule 42(c) and as the Conservator of the Estate of Ruth has a duty to notify the beneficiaries or interested persons as Trustee of actions actually known by the fiduciary to be illegal or "that may threaten the security of assets under administration or the interest of the beneficiaries and monitor the status of the Estate and ensure that required actions such as accountings and closing of a probate estate are performed timely". HPR Rule 42(b).
- 15 In many instances, it is the possibility of the breach of confidence, not the fact that of breach itself that triggers disqualification. *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980). The Court in *Trone* stated:
Disqualification does not depend upon proof of the **abuse** of confidential information. Because of the sensitivity of client confidence and the profession's institutional need to avoid even the appearance of a breach of confidence, disqualification is required when lawyers change sides in factually related cases. The district court applied too permissive a standard and thus erred in failing to remove counsel.... Fiduciary obligations and professional responsibilities may want disqualification of counsel in appropriate cases even in the absence of a strict attorney-client relationship.... Smith's potential liability in this case is inextricably intertwined with that of the other defendants. The interrelation compels the conclusion that the appearance of a fair trial of Smith cannot be guaranteed while Wyman is present in the courtroom on behalf of plaintiff even as co-counsel.
- 16 Barbara called APPELLANT KITTY and her sister in tears as she was afraid she might be forced to go to jail over the charges in the lawsuit. Further, when Barbara contacted Chester's daughters, APPELLANT KITTY and her sister, she stated that Chester would not want his estate to go to Ruth's niece and nephew, Meredith and Moreira.
- 17 Erratically the lower court would ask the CONSERVATOR to notice all parties. The lower court did request that notice be given at the first hearing for termination and discharge of the conservator at which APPELLANT KITTY and her sister's counsel appeared. In stark contrast, APPELLANT KITTY and her sister failed to receive notice of the CONSERVATOR'S second hearing to be held on October 24, 2008, asking the lower court to terminate and discharge her, while simultaneously seeking attorney fees and costs for additional improper filings. It was only research on Ho'ohiki that permitted APPELLANT KITTY to learn of the second final accounting. APPELLANT KITTY and her sister objected to this final accounting and the CONSERVATOR'S failure to contact them as the lower court ordered. After their objection was filed and correspondence confirmed they had not been noticed, the hearing was again continued to December 12, 2008.
- 18 This is supported by this Court's decision in *The Estate of James Campbell* which ruled that in an extreme scenario a newspaper and a television station could not be described as an "interested person", however, the court did rule that even in that scenario there was, "a common law presumption of judicial openness [which] accompanies probate proceedings, which may be overcome upon a showing of strong countervailing reasons that outweigh the public's presumptive right of access to court proceedings and records..." 106 Haw. 453, 455-54, 459-61, 106 P.3d 1096, 1098-99, 1102-1104. See also *Gary Lee Middleton v. Mary Jean Chaney et. al* in which the court looked closely at the words "reasonable diligence" and found the guardians had failed to "substantially compl[y]" with the requirements to ascertain the whereabouts of the father's identity prior to getting the Court's approval for the guardianship of his child. 335 Ore. 58, 57 P.3d 893 (2002).
- 19 In any event, Tongg's Declaration failed utterly to meet the condition precedent set by the lower court. Tongg's Declaration stated that the bulk of the settlement was the property of his client, Barbara, not the protected person, Ruth. Tongg states that "the Cash and Credits... are neither the property of the Protected Person nor of her late husband, Chester." The cash and credits are valued at

\$522,000. Tongg's Declaration also clearly states that the home belongs to Barbara. Therefore, Tongg's could not state that the bulk of the funds being distributed in the Settlement Agreement belonged to the Protected Person, Ruth.

Then Tongg stated the Settlement Agreement does not involve claims or property that relates to Chester, however, the basis for his statement is that he has argued that these assets were held in joint tenancies with right of survivorship with his client, Barbara, at the time of Chester's death, therefore, they belong to Barbara. Tongg's assertion ignores the fact that Barbara exerted undue influence on Chester in order to obtain title or access to the multiple bank accounts and the house voiding their transfer. Tongg's statement is not legally truthful, nor does it take into account the underlying facts of this case and legal theories being presented.

Tongg laid out detailed billing statements as the lower court ordered, but the actual terms of the Settlement Agreement states these fees are NOT supposed to be paid out of the Conservatorship proceeding at all, expressly stating that the Estate of Ruth C. Scupholm is responsible to pay these costs. The lower court erred in stating that the conservancy could be obligated to pay the attorney fees and costs as neither Chester nor Chester's estate should be responsible for any fees incurred in drafting the Settlement Agreement pursuant to the express terms of the Settlement Agreement itself.

When asked to tell the lower court why the Court should approve the reimbursement of the attorney's fees and costs and payment to Barbara, Tongg's Declaration argued that if his fees and the settlement sum of \$75,000 to the caregiver are not paid then the bank accounts that she has turned over to the Conservator "would revert back to Ms. Rapisora" for failure of consideration. This argument fails to take into account the lower court had no responsibility to enforce an illegal contract which is void as it violates underlying public policy. Why would a Settlement Agreement with a caregiver who took advantage of an **elderly** couple to ensure she inherited over \$1,200,000.00 worth of assets - *stealing it from the rightful descendants* - require court enforcement? Tongg's Declaration is bold in his conclusions, but he utterly fails to account for the acts of possibly a criminal nature which his client committed against an **elderly** couple.

20 As stated in the court filings, Hosoda's Declaration, untimely filed after the lower court's deadline, makes the statement, swears to it under penalties of law, but then caveats the statement in such a way in the following paragraph that it appears he is swearing only to the truth of the fact that the "Conservator stated the property belonged to the protected person." Critically, Hosoda never states why he believes the property belonged to the protected person, instead he relies on the Conservator's statements to justify the truth of his Declaration, without stating that was what he believed.

Hosoda then appears to state unequivocally that "all of the property that is the subject of this settlement was the property of the protected person", but then he subsequently qualifies the statement in such a way that semantically his declaration becomes virtually meaningless. Standing alone, Hosoda's declaration in paragraph two (2) meets this Court's first condition, however, in his very next paragraph he limits his statement by saying that the reason this was true was based on the legal premises put forward by the CONSERVATOR in her filed Inventory, not that he believes in her legal rationale for making such claims. Hosoda then concludes that based on the "foregoing" paragraphs the settlement does not involve claims or property that relate to Chester.

Hosoda's Declaration relies on the facts as put forth in the Conservator's Inventory, which then, based on the Conservator's conclusions, Hosoda is able to say the settlement does not involve claims or property that relate to Chester. Again, Hosoda does not state who he believes holds title to the property and under what legal theory. Hosoda appears to sidestep what he is willing to put on record under oath by careful phrasing of the language and he does not state unequivocally what he believes and what the basis of his belief is.

21 The lower court also erred when it did not appoint a Master to review the actions of the CONSERVATOR, her petition and her second accounting as asked by APPELLANT KITTY to determine whether the CONSERVATOR's actions were within the authorizations granted to her by statute and by the Probate Code. It is clear that the actions of the CONSERVATOR diminished the conservatorship's assets in violation of § 560:5-425, HRS and allowed assets to be disseminated outside the conservatorship **AFTER** the death of the protected person, and before her estate was opened, without Probate Court approval. Ratification is not an option because the actions of the Conservator must be approved in advance. Further, the lower court failed to enforce its own Order, June 18, 2008, requiring that all of attorneys fees and costs for Petitioner's counsel Hosoda and Tongg that would be paid must be itemized and an affidavit filed for the fees and costs including an itemized billing statement.

22 In fact, apparently the CONSERVATOR was asking the banks the wrong question to give her the legal foundation to tell the lower court that Chester had no right to Ruth's estate. The lower court specifically asked the CONSERVATOR the question, "[I]t goes back to Mr. Scupholm and whether that really was his property or if it was their joint property, and she [Conservator] said she can't tell. Isn't that correct?" The CONSERVATOR responded, "Well, I have to confirm with the banks, Counsel, as to the banks' language. That's my understanding in looking at their language. But I want to confirm that with the bank." The CONSERVATOR continued stating, "For example, CPB's legal counsel tells me that when it's Chester or Ruth and there's no other designation, that means that it's a joint tenant with right of survivorship. But, I can't - I can't make that jump and say, okay, Territorial is the same kind of language...."

23 Chester V. Scupholm died on April 21, 2007. Prior to his death, Chester closed bank accounts which he held in title with Ruth as joint tenants with the right of survivorship. By virtue of closing these jointly held accounts, Chester literally transferred the wealth

which he had previously held jointly with his wife to himself exclusively. For example, Chester closed the American Savings Bank, Certificate of Deposit (CD #XXXXXXXXXX) held as a Joint Tenancy with Ruth on January 16, 2007 and received a check payable to himself for \$100,666.39 and accepted penalties in the amount of \$1,087.49 for his early closure of the jointly held Certificate of Deposit. Chester closed a second American Savings Bank, Certificate of Deposit (CD #XXXXXXXXXX) held as a Joint Tenancy with Ruth on January 16, 2007 and received a check payable to himself for \$100,184.93 and accepted penalties in the amount of \$1,109.59 for his early closure of the jointly held Certificate of Deposit. Chester closed a third American Savings Bank, Certificate of Deposit (CD #XXXXXXXXXX) held as a Joint Tenancy with Ruth on January 16, 2007 and received a check payable to himself for \$100,184.93 and accepted penalties in the amount of \$1,109.59 for his early closure of the jointly held Certificate of Deposit. In addition, according to the Conservator's own Schedule of Property, she also lists two accounts at Finance Factors which were opened originally by Ruth and Chester as Joint Tenants with Right of Survivorship but, which Chester closed on January 16, 2007. These accounts were as follows: January 16, 2007, Chester closed the first joint Finance Factors account (#533) and received a check payable to himself for \$101,380.76. On January 16, 2007, Chester closed the second joint Finance Factors account (#611) and received a check payable to himself for \$101,284.15. These liquidated funds were then consolidated by Chester in an account which he used to sign a check to purchase the house in Kailua for \$722,264.73. Potentially there is \$1.2 million dollars worth of assets that needs to be correctly analyzed to see how much belongs to Chester's estate and how much belongs to Ruth's estate.

24 *First*, Barbara accompanied Chester to her lawyer's office and was physically present when Chester spoke with Barbara's close friend, the attorney, regarding his intentions to execute a will on January 22, 2007. *Second*, Barbara had established a confidential relationship with the testator which is evidenced by the fact that she not only cared for both Ruth and Chester's medical needs, she was named on their bank accounts which had hundreds of thousands of dollars, cleaned their house and ran errands for them. *Third*, when the attorney, Erin Baxter, Esq., JAG Corps., questioned Chester to discuss his intentions for bequeathing his and his wife's entire estate to Barbara, the Barbara was present at all times. Fourth, the Barbara recommended her long-time personal friend -- *literally hanai family as Barbara had babysat her children while Ms. Baxter attended law school* -- to be the attorney to draft the new will, she drove Chester to the appointment and stayed with him while his new will was drafted. *See Exhibit "B"*, at 5-6. *Fifth*, Barbara had intimate knowledge of the contents of Chester's will and its location and by the time he died she also knew where all his bank accounts were located and ensured she had access to them prior to his death. *Sixth*, Barbara arranged for the witnesses to be present at the signing of Chester's new will, even though the will was signed *before* the witnesses entered the room so the witnesses did not, in fact, see Chester actually sign the will. *Seventh*, Barbara had possession of the will and other estate-planning documents signed by the beneficiary which is evidenced by bank statements showing Barbara withdrew funds totaling \$150,819.08 from Chester's bank accounts and deposited the funds, in an account which she held jointly with her grandson, on April 30, 2008, nine days after Chester's death.